STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS COSMO JARRARD,

Defendant-Appellant.

UNPUBLISHED
February 14, 2003

No. 235092
Ingham Circuit Court
LC No. 00-076249-FC

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, and felony-firearm, MCL 750.227b(1). The trial court sentenced defendant to 5 to 15 years' imprisonment for voluntary manslaughter, consecutive to his mandatory sentence of 2 years' imprisonment for felony-firearm. Defendant now appeals as of right. We affirm defendant's convictions, but remand to the trial court for resentencing.

Defendant first argues that the trial court erred in giving the standard self-defense instruction, CJI2d 7.16, that defendant had the duty to retreat. Defendant claims that because he was within the curtilage of his dwelling, he had no duty to retreat. We disagree.

Generally, a trial court is required to instruct the jury in the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). Jury instructions are crafted to permit the factfinder to correctly and intelligently decide the case and should include defenses and theories where supported by the evidence. *People v Burns (On Remand)*, 250 Mich App 436, 440; 647 NW2d 515 (2002). When reviewing claims of instructional error, this Court reads the instructions as a whole rather than piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions do not create error if they fairly represented the issues to be tried and sufficiently protected the defendant's rights. *Id.* However, where a requested instruction is not given, the defendant bears the burden of establishing that this constituted a miscarriage of justice. MCL 769.26; *Rodriguez, supra* at 473-474; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

Ordinarily, a claim of self defense is founded on necessity and the killing is justified only where the defendant establishes: (1) he honestly believed that he was in danger; (2) the degree of danger he feared was serious bodily harm or death; and (3) the action taken by the defendant

appeared at the time to be immediately necessary. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991); *People v Beason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). In instances where a person claims self-defense, the jury must be satisfied that the person did all that could be done to avoid the conflict. *People v Gilliam*, 27 Mich App 314, 316-317; 183 NW2d 364 (1970) (conviction affirmed where evidence showed that the defendant was in no peril and that he chose not to pursue a ready means of escape). Essentially, a person must retreat if retreat is safely possible before exercising deadly force to repel an attack. CJI2d 7.16; *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961).

The Supreme Court's recent decision in *People v Riddle*, 467 Mich 116; 649 NW2d 30 (2002), conclusively settled the threshold requirements regarding a person's duty to retreat. It examined three intertwined concepts that provide guidance in applying the general rule regarding a duty to retreat in certain fact specific situations: (1) a person is never required to retreat from a sudden, fierce, and violent attack, nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon; (2) a non-aggressor has an affirmative obligation to retreat where he was a participant in voluntary mutual combat; and (3) regardless of circumstances, a person who is attacked in his dwelling is never required to retreat "where it is otherwise necessary to exercise deadly force in self-defense," and the killing will be deemed justifiable. *Riddle, supra* at 119-121.

Importantly, the *Riddle* Court rejected the position that the "castle doctrine" included outlying areas within the curtilage of the home and instead limited its application to the home and its *attached* appurtenances. *Riddle, supra* at 121, 135. Likewise, the Court stated that the necessary inquiry concerning a claim of self-defense as a justification for homicide centers on necessity. *Id*. at 127. Thus, the question becomes whether defendant did all he reasonably could do to avoid the necessity of extreme resistance, or whether he was within the one of the exceptions that would obviate his duty to retreat.

On the record presented, we are not convinced that defendant's factual circumstances fall within any of the stated exceptions. First, defendant was not subjected to a sudden and violent attack. See *People v Macard*, 73 Mich 15, 21-22; 40 NW 784 (1888) (no duty to retreat if there was no reasonable opportunity or means of avoiding anticipated assault with a deadly weapon); *Riddle, supra* at 129 n 21. In this case, there was sufficient time between the initial altercation and the fatal shooting to defuse the situation by calling the police. Second, the occupants of the car were not armed and had not visibly demonstrated an intention to initiate a deadly attack that needed to be repulsed with deadly force. Third, the occupants of the car did not enter defendant's premises, much less his dwelling, before the fatal shot was fired. While the porch is considered part of the dwelling for purposes of the no duty to retreat rule, it is uncontested that defendant was neither on his porch nor on an attached appurtenance at the time of the fatal shooting. See *Riddle, supra* at 137-138; see also *People v Canales*, 243 Mich App 571, 576-577; 624 NW2d 439 (2000) (porch is part of the home for purposes of the no-retreat rule). Defendant was outside his home in the yard between the stairways; thus, he had a duty to retreat. *Riddle, supra* at 121. As the *Riddle* Court reiterated, "the touchstone of any claim of self-defense, as a justification for homicide, is necessity." *Id.* Under the circumstances presented, the trial court was not required to read CJI2d 7.17 because the evidence did not support it. *Rodriguez, supra* at 472-473.

Here, the standard jury instruction adequately conveyed the applicable law that "the baseline inquiry is *necessity*." *Riddle, supra* at 141 (emphasis in original). Moreover, the jurors were also given a comprehensive general self-defense instruction, CJI2d 7.15, which further explained the relevant principles and permitted the jury to consider how the circumstance in their totality affected defendant's choice. *Id.* at 141-142. Together, these instructions served to adequately convey the applicable law. *Rodriguez, supra* at 472-473. Accordingly, the trial court did not abuse its discretion in giving the standard self-defense jury instruction. *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

Defendant also claims the he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 6 at twenty-five points and that this scoring error resulted in a sentence beyond the recalculated guidelines' minimum recommendation. We agree.

As a preliminary matter, this sentence is controlled by the legislative guidelines, MCL 769.34 *et seq*., because the charged offense occurred on August 22, 2000. The legislative sentencing guidelines require this Court to affirm all sentences within the guidelines' range absent an error in scoring the sentencing variables or inaccurate information used in determining the defendant's sentence. MCL 769.34(10); *People v Leversee,* 243 Mich App 337, 348; 622 NW2d 325 (2000).

Generally, the offense variable factors of the guidelines' calculations address the circumstances of the crime for which the defendant is sentenced. Under the legislative guidelines, defendant was convicted of voluntary manslaughter, a Class C felony against a person, which requires scoring of OV 6, intent to kill or injure another individual. MCL 777.16p; MCL 777.22; MCL 777.36(1). The sentencing judge must score this variable consistent with the jury's verdict unless the judge has information that was not presented to the jury. MCL 777.36(2)(a); *People v LeMarbe (After Remand)*, 201 Mich App 45, 48; 505 NW2d 879 (1993); *People v Rodriguez*, 212 Mich App 351, 353-354; 538 NW2d 42 (1995). The court is also required to score ten points if the killing is within the definition of second-degree murder or voluntary manslaughter, "but the death occurred in a combative situation or in response to victimization of the offender by the decedent." MCL 777.36(2)(b).

Here, the jury convicted defendant of voluntary manslaughter, which is a killing in the heat of passion. *People v Townes*, 391 Mich 578, 589-590; 218 NW2d 136 (1974). It is undisputed that no additional information regarding defendant's intent was made available to the sentencing court that the jury did not already consider. Accordingly, as defendant argues and plaintiff agrees, OV 6 should have been scored a maximum of ten points.

As plaintiff concedes, the scoring error affected defendant's sentencing guidelines' range. Because his total OV points should have been 60 rather than 75, the appropriate guidelines' range was between 29 and 57 months. Because defendant's five-year minimum sentence exceeds that range by three months, defendant is entitled to resentencing. However, contrary to defendant's contention, we discern no reason to assign a different judge to conduct resentencing. *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001); see also *LeMarbe, supra* at 53.

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio